trade name the arguments in favor of the interference of equity seem doubly cogent. To refuse relief may cause the plaintiff irreparable injury, while granting the injunction works no forfeiture upon the defendant, since under any other name the true merits of his wares will as well appeal to the public.

EFFECT ON INCOMPLETE RELEASE OF APPOINTMENT OF DEBTOR AS EXECUTOR. — Where an incomplete transaction *inter vivos* presents clear evidence of an intention to make a gift or to release a debtor, the English courts in general have held that the appointment of the intended donee or debtor as executor perfects the gift or release.[1] The vesting of the legal title to the estate in the executor is considered to supply the necessary legal formalities and to complete the transaction. But to deal adequately with the problem it is necessary to examine more closely the principles upon which this result may be reached in each of the two types of cases.

The testator's will at his death gives the legal title of all his personal property to his executor in trust for the fulfilling of certain duties. Under the early law the executor was presumed to take an absolute property in the residue.[2] Later it was provided by statute in England that it should be conclusively presumed that the executor take no beneficial interest, but hold any residue in trust for the next of kin or residuary legatee, and this presumption could be rebutted only by evidence on the face of the will.[3] It is submitted that under such a statute, the effect of making the intended donee executor would not be to complete the gift, since a contrary intent is implied into the will by what is in effect a statutory rule of construction.[4] In America a similar result would probably be reached, even in the absence of a specific statute, by a construction of the will itself.[5]

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[1] Strong *v.* Bird, L. R. 18 Eq. 315 (release); *In re* Applebee, [1891] 3 Ch. 422 (release); *In re* Griffen, [1899] 1 Ch. 408 (release); *In re* Stewart, [1908] 2 Ch. 251 (gift of bonds). *Contra, In re* Hyslop, [1894] 3 Ch. 522 (release); Battle *v.* Knocker, 46 L. J. Ch. 159 (gift of a house). *Cf.* early cases, Byrn *v.* Godfrey, 4 Ves. 5 (accord); Wekett *v.* Raby, 2 Bro. P. C. 386 (*contra*); Brown *v.* Selwin, 3 Bro. P. C. 607 (*contra*). *Cf.* Sibthorp *v.* Moxon, 3 Atk. 579.

[2] The presumption that the executor took beneficially could not be defeated by parol evidence, to make him trustee of the residue for the next of kin. White *v.* Williams, 3 Ves. &. B. 72. If, however, a non-conclusive contrary intention seemed to be shown on the will, parol evidence could be brought in to show the testator's real intention. Walton *v.* Walton, 14 Ves. 318; Mallabar *v.* Mallabar, Cas. *t.* Talb. 78. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1208, n. 1.

[3] 11 GEO. IV. & 1 WM. IV., c. 40; Love *v.* Gaze, 8 Beav. 472.

[4] Battle *v.* Knocker, *supra. Contra, In re* Stewart, *supra.* Where a residuary legatee is appointed, the use of parol evidence to deprive him of part of the residue would be clearly against the Wills Act.

[5] See note 10, *infra.* The particular question under discussion does not seem to have arisen in America, but either by express statute, by construction of the Statute of Distribution, or by decision, the executor in most states must hold any residue in trust for the next of kin, and parol evidence would probably not be admitted to effect a different result. Paup *v.* Mingo, 4 Leigh (Va.) 163; Hays *v.* Jackson, 6 Mass. 148, 152; Nickerson *v.* Bowly, 49 Mass. 424, 431; Hill *v.* Hill, 2 Hayw. (S. C.) 298; Dunlap *v.* Ingram, 4 Jones Eq. (S. C.) 178; Broome *v.* Alston, 8 Fla. 307; Chamberlin's Appeal,

The question of the incomplete release is, however, different. Under the English law the appointment of a debtor as executor completely destroys the debt.[6] This is based on the theory that as an executor cannot sue himself the legal liability is cut off, and a voluntary destruction of the liability destroys the whole chose in action. But equity considered that it was inequitable for the debtor to be excused from liability by what might be termed a legal accident. Therefore to carry out the probable intention of the testator which the law could not do, it forced the executor to hold an amount of his own property equal to the debt, in trust for the next of kin.[7] Two questions then arise: (1) Will the fact that the testator would have desired the debt to be released prevent the raising of this equitable liability? (2) Does any rule of law exclude evidence of this fact?

In cases of resulting trusts, where evidence of a contrary intention can be admitted, the rise of the equitable duty or liability will be prevented.[8] Again, where the legal liability of a debtor is released by the destruction of a specialty, an equitable liability will arise unless it appears that the act was accompanied by an intent to release the debtor. Since equity in the facts under discussion raises a trust, as an aid to the law, only for the purpose of carrying out what probably would have been the intention of the testator, it does not seem illogical from these analogies that equity should refuse to raise a trust if it can be shown that the testator would have intended otherwise.[9] It is clear that no actual intent appears on the face of the will, from the mere appointment of an executor, that he hold a part of his own property in trust for the next of kin.[10] Nor is there any statutory rule of construction which implies this intention from the appointment.

It is clear also that the admission of evidence of this intention does not give effect to a parol testamentary disposition. The asset to which it indirectly relates has been destroyed as the legal result of the debtor's

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70 Conn. 363, 39 Atl. 734; Linnott *v.* Kenaday, 14 App. Cas. (D. C.) 1; Wilson *v.* Wilson, 3 Binney (Pa.) 557.

[6] Wankford *v.* Wankford, 1 Salk. 299. See Nedham's Case, 8 Co. 135, 136. See WOERNER, AMERICAN LAW OF ADMINISTRATION, § 311; WILLIAMS, EXECUTORS, 7 Am. ed., 624 *et seq.*

[7] Carey *v.* Goodinge, 3 Bro. C. C. 110; Freakley *v.* Fox, 9 B. & C. 130; Berry *v.* Usher, 11 Ves. 87.

[8] Mallabar *v.* Mallabar, Cas. *t.* Talb. 78; Benhow *v.* Townsend, 2 L. J. Ch. 215; Jackson *v.* Feller, 2 Wend. (N. Y.) 465.

[9] While the attempt to release the debt before death is not much evidence that the testator intended the will to operate as a release, yet it is evidence that he would not have intended the debtor to pay his debt to the next of kin.

[10] It is true that the use of certain words is considered to imply the intent to accomplish a particular legal effect. And in England by rules of construction parol evidence to prove that some other effect was intended is not always admissible. For instance, it cannot be shown that an express trustee was intended to take beneficially. Croome *v.* Croome, 59 L. T. R. 582. And the same reasoning is likely in America to exclude evidence that property, passed directly to an executor by his appointment, is not intended to be held in trust. On the other hand, when A. pays B. for a conveyance from B. to C., a resulting trust arises for A., but may be rebutted by evidence of a contrary intent. Jackson *v.* Feller, 2 Wend. (N. Y.) 465. In the facts under discussion the equitable liability is not attached to any property passed by the will but to the executor's own estate. It is difficult to imply merely from the words appointing an executor any actual intention that this new debt shall arise in equity.

becoming executor. This evidence then merely proves circumstances which may or may not impose an equitable liability on the executor's estate and would therefore seem admissible. The decision in a recent English case, that the appointment of the debtor as executor after an ineffective release *inter vivos* extinguishes the debt, seems therefore sound. *In re Pink*, [1912] 2 Ch. 528.[11]

THE DOMICILE OF A WIFE. — At common law, a husband and wife were considered as a single legal unit. Being but one unit they had but one domicile, which was that of the husband.[1] In the main this theory persists to-day, but certain modifications of the rule have been made in connection with divorce. Since only the domiciliary sovereign can dissolve a marriage,[2] a wife at common law would be required to sue for a divorce at her husband's domicile, no matter to what place he may have removed it.[3] As a relief from this manifest injustice, the wife is allowed to have a separate domicile for the purpose of securing a divorce. The rule which prevails in most American jurisdictions is that the wife may establish a separate domicile for this purpose wherever she resides *animo manendi*, providing she has a good cause for divorce.[4] A few courts hold that this separate domicile can only be established in the same jurisdiction as the last matrimonial domicile.[5] On the other hand, English courts have adhered more closely to the common-law rule and have required the wife to sue for divorce at her husband's domicile;[6] but they allow her to sue at the last matrimonial domicile when the husband left it in order to deprive her of this right, on the theory that the husband's act is a fraud on the wife and that he cannot be allowed to take advantage of his own wrong.[7]

The idea that the wife's domicile may depend on acts of the husband having no connection with the cause of divorce is extended even further in a recent English case. A marriage occurred in England between an Englishwoman and a domiciled Greek, but no matrimonial domicile was established anywhere. The marriage was annulled in Greece on the ground

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[11] Strong *v.* Bird, *supra*; *In re* Applebee, *supra*; *In re* Griffen, *supra*. *Contra*, *In re* Hyslop, *supra*. By statute and decision in many American jurisdictions the debt is not extinguished at law, by the appointment of the debtor as executor. It would still be a legal asset, therefore, and parol evidence could not be brought in to affect its disposition. See WOERNER, AMERICAN LAW OF ADMINISTRATION, § 311; 2 WILLIAMS, EXECUTORS, 6 Am. ed., 1488 *et seq.*

[1] See 1 BL. COMM. 442.

[2] Wilson *v.* Wilson, 2 P. D. 435; State *v.* Armington, 25 Minn. 29; People *v.* Dawell, 25 Mich. 247.

[3] See WHARTON, CONFLICT OF LAWS, 3 ed., § 224.

[4] Ditson *v.* Ditson, 4 R. I. 87; Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806; Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

[5] See Burtis *v.* Burtis, 161 Mass. 508, 511, 37 N. E. 740, 741; Haddock *v.* Haddock, 201 U. S. 562, 570, 26 Sup. Ct. 525, 527. This rule is followed in European countries. See WHARTON, CONFLICT OF LAWS, 3 ed., 445, n. 2.

[6] Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Tollemache *v.* Tollemache, 1 Sw. & Tr. 577; Wilson *v.* Wilson, L. R. 2 P. D. 435.

[7] See Deck *v.* Deck, 2 Sw. & Tr. 90. This rule seems to confer only a right to sue at the last matrimonial domicile. Le Sueur *v.* Le Sueur, 1 P. D. 139.